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No. 85-1559

In the Supreme Court of the United States

OCTOBER TERM, 1985

VICTOR POSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's midtrial grant of petitioner's motion for a severance bars petitioner's retrial on grounds of double jeopardy.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 9

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Lee v. *United States*, 432 U.S. 23 ..... 8, 9, 10, 12

Oregon v. *Kennedy*, 456 U.S. 667 ..... 7, 8, 9, 12, 13, 14

Robinson v. *Wade*, 686 F.2d 298 13

United States v. *Curtis*, 683 F.2d 769, cert. denied, 459 U.S. 1018 13

United States v. *Dante*, 739 F.2d 547, cert. denied, 469 U.S. 1036 13

United States v. *Dinitz*, 424 U.S. 600 ..... 9, 10, 12, 13

United States v. *Doe*, 465 U.S. 605 14

United States v. *James*, 590 F.2d 575, cert. denied, 442 U.S. 917 2

United States v. *Scott*, 437 U.S. 82 ..... 9, 10

United States v. *Wodtke*, 711 F.2d 86 13

Page

Constitution, statute and rule:

U.S. Const. Amend. V (Double Jeopardy Clause) 7, 8, 9, 10, 11, 12, 14

18 U.S.C. 371 1

Fed. R. Crim. P. 12(e) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 780 F.2d 1536. The opinion of the district court (Pet. App. 6a-13a), which is reprinted as an appendix to the court of appeals' opinion, is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a-5a) was entered on January 21, 1986. The petition for a writ of certiorari was filed on March 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 14, 1983, petitioner and co-defendant William Scharrer were charged with conspiracy to evade taxes, in violation of 18 U.S.C. 371, and with several substantive violations of the internal revenue laws. The charges were based on petitioner's donation of two parcels of real

estate to Miami Christian College. The indictment alleged that Scharrer supplied overvalued appraisals of the properties in order to enable petitioner to claim inflated charitable deductions on his tax return, and that petitioner attempted to evade his income taxes by claiming those inflated deductions. Pet. App. 14a, 27a.

A joint trial of petitioner and Scharrer was scheduled. Prior to trial, petitioner moved the district court for a hearing, pursuant to *United States* v. *James,* 590 F. 2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), to determine the admissibility of several alleged co-conspirator statements that the government intended to offer in evidence at trial (Pet. App. 7a). Those statements included a letter written by Scharrer to Loren Felabom, the business manager of Miami Christian College, in which Scharrer admitted that his appraisals of the donated properties were greatly inflated and had been developed for tax purposes (*id.* at 7a, 14a, 27a-28a).

In a discussion in chambers concerning the pretrial *James* hearing, petitioner's counsel argued to the district court that admitting the Scharrer letter in a joint jury trial would be incurably prejudicial to petitioner. Counsel then suggested the alternatives of a bench trial, a severance, a dual jury, or a bifurcated trial. The district court rejected the suggestion for a bench trial and indicated that it would sever the defendants in the event severance became warranted. Pet. 4.

At the *James* hearing, the district court commented that " 'there is a very [colorable] argument to be made that [the July 29, 1976 Scharrer letter] is not in furtherance of the conspiracy' " (Pet. App. 7a (brackets in original)). The court also noted that, if the letter were admissible against Scharrer as an admission but inadmissible against petitioner on co-conspirator grounds, there would be "a serious

question as to whether limiting instructions would adequately protect [petitioner] from the jury's improper consideration of the letter" (*ibid.*). In response to an inquiry by the court, the government stated "unequivocally that it intended to offer the [letter] against Scharrer" even if it were inadmissible against petitioner (*id.* at 8a).

The district court then turned to the appropriate procedure for deciding the admissibility of the Scharrer letter. The government indicated its view that the issue should be resolved before the jury was sworn, and the court granted a one-hour recess to allow the government to prepare its legal argument. Pet. App. 8a.

When the hearing resumed, the district court stated that it would need to hear the government's witnesses in order to render a ruling on the admissibility of the letter. Because of the need to receive the testimony of witnesses on the issue, the court directed that trial should commence as scheduled. Pet. App. 8a.

In following that procedure, the district court was mindful that jeopardy would attach once the jury was sworn. The court asked whether the question of admissibility should be decided "prior to the jury being sworn" or "should it be done after the jury is sworn and during the course of this trial which would, upon being admitted, if it is admitted in the fashion in which it is, and only against Mr. Scharrer, result in a severance of [petitioner] at that point" (7/26/84 H. Tr. 104). The government raised its concern about potential double jeopardy problems, and the court replied that "obviously * * * that is the reason that I posed the question" (*ibid.*). The court then stated its

> view * * * that there obviously cannot be any contention [by petitioner] with regard to double jeopardy. If [petitioner's counsel] moves for a severance of [petitioner], he brings about [petitioner's] discharge from

> the case and it is his decision that he would prefer for [petitioner] not to be tried along with Mr. Scharrer if this documentation is going to be admitted only against Mr. Scharrer on the basis that a Court instruction will not cure the effect of it at which time he has brought about the jeopardy to be undone, and in my opinion could not conceivably contend that there was any double jeopardy. I don't think it can be contended in any form or fashion that it was brought about by prosecutorial misconduct. I mean, obviously, a conscientious good faith effort to get evidence admitted against both parties and a ruling by the Court that it is admissible only as to one, if that is the result, I don't think gives rise to that.

Id. at 108-109. After reiterating that it "certainly would not want to be in a position to make a ruling that would be binding upon me until I have heard the live testimony" (*id.* at 109), the court stated that counsel "know where I am going" if the letter were ruled to be inadmissible against petitioner and if "[petitioner's counsel] gets up and makes his motion, which I don't know whether he will or not" (*id.* at 110). Likewise, the court ordered the government not to refer to the letter in its opening statement because of the resulting prejudice if the letter were later admitted "only against Mr. Scharrer and [petitioner's counsel] does not move for a severance and relies only on the Court's instruction to the jury to disregard it insofar as [petitioner] is concerned" (*id.* at 111). At no time during this proceeding did counsel for petitioner raise an objection to the court's procedure or assert a double jeopardy claim (Pet. App. 9a).

2. The joint trial of petitioner and Scharrer began on July 26, 1984. After a number of witnesses had testified, the issue of the admissibility of the disputed documents arose. The court then took the testimony of several further witnesses outside the presence of the jury. Based on that

record, and following further legal argument, the court concluded that the Scharrer letter could not be introduced against petitioner because it was not in furtherance of the conspiracy. In addition, the court ruled that limiting instructions would not adequately protect petitioner from the prejudicial effect of the letter on the jury. The government then sought to justify the use of the letter against petitioner on the alternative ground that it was a declaration against interest, but the court also rejected that theory. Pet. App. 9a-10a.

In excluding the letter as to petitioner, the district court stated, as it had at the *James* hearing, that "in the event that [petitioner] after the offer and acceptance [of] the evidence of that document [against Scharrer], moves for a severance, the Court will grant that severance on the basis that the prejudice is such that it cannot be cured by any instruction to the jury, in which event this cause will proceed with Mr. Scharrer and without [petitioner] for the completion of this trial" (7/31/84 Tr. 463-464). As the court then emphasized (*id.* at 477-478):

> The Court's view is that I am not going to have any question in this record with regard to the issue of jeopardy.
>
> And that is that unless and until * * * the prejudice is there and it has been made and it has been offered, at that point in time I will expect [petitioner's counsel] to make the decision as to whether or not he is going to move for a severance or not move for a severance.
>
> If he moves for severance it will be granted; if he does not, then we will proceed with the trial of this case.
>
> * * * * *
>
> And I will instruct the jury at that time that they are to disregard totally [the Scharrer] letter in the absence of a motion for severance. Okay?

> If there is no motion for severance made I am going to instruct this jury to disregard [the letter] insofar as [petitioner] is concerned.

As in the *James* hearing, counsel for petitioner did not oppose the court's proposal or interpose a double jeopardy claim.

Thereafter, the government offered the Scharrer letter in evidence through its witness Loren Felabom, to whom the letter had been written. The district court admitted it only against Scharrer. At a sidebar conference, counsel for petitioner then stated that he was "asking Your Honor formally now on behalf of [petitioner] for a severance" (8/1/84 Tr. 588-589). After the jury was excused, petitioner's counsel, in open court,

> formally ask[ed] the Court at this time on behalf of [petitioner] for a severance.
>
> I ask that he be severed out of this trial on the ground that this evidence is so highly prejudicial to him that it should not be admitted in evidence in any trial in which he is a party defendant.
>
> * * * * *
>
> I have made these points previously to Your Honor, in a lengthy legal argument outside the presence of the jury and I now formally move for a severance * * *.

Id. at 589-590. The district court then granted the motion for a severance and scheduled a status conference to set a date for petitoner's separate trial (*id.* at 590-592). Petitioner's counsel did not object to the proposed retrial or suggest that, since the letter had not yet been disclosed to the jury, the present trial should proceed against petitioner rather than Scharrer (Pet. App. 11a).[1]

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[1]Indeed, even at the scheduled status conference nine days later, petitioner raised no objection to a retrial (Pet. App. 11a).

Following petitioner's severance, the trial resumed and the letter was introduced in evidence. The jury convicted Scharrer on all counts (Pet. App. 15a n.1).

3. Prior to petitioner's retrial, the government filed a motion in limine seeking reconsideration of the district court's ruling that the Scharrer letter and other co-conspirator statements were inadmissible against petitioner. The district court adhered to its previous determination. *United States* v. *Posner*, 594 F. Supp. 923 (S.D. Fla. 1984) (Pet. App. 14a-25a). On the government's interlocutory appeal of the order excluding evidence, a divided panel of the court of appeals affirmed. *United States* v. *Posner*, 764 F.2d 1535 (11th Cir. 1985) (Pet. App. 26a-33a).

In the court of appeals, petitioner asserted, for the first time in the case (see Pet. App. 11a), that the retrial was barred by the Double Jeopardy Clause. The court of appeals explained that "[b]ecause [petitioner] filed the motion that led to the district court granting severance with respect to him, [petitioner] must demonstrate an 'intent on the part of the prosecutor to subvert the protection afforded by the Double Jeopardy Clause' * * * by establishing that 'the governmental conduct in question [was] intended to "goad" the defendant into moving for a mistrial' " (*id.* at 32a, quoting *Oregon* v. *Kennedy*, 456 U.S. 667, 676 (1982)). Since this "standard calls for a finding of fact by the court * * * for which the trial court is best suited" (Pet. App. 32a), and since "[petitioner] has not filed any motion in the district court subsequent to the severance that would provide the district court with an opportunity to re-evaluate the double jeopardy question in light of the evidence introduced at trial" (*id.* at 33a), the court of appeals left it to the district court to make "findings on prosecutorial intent" (*ibid.*).

4. The district court denied petitioner's ensuing motion to dismiss the indictment on double jeopardy grounds (Pet. App. 6a-13a). The court first summarized the earlier proceedings in the case, noting in particular that the government had sought a pretrial decision on the admissibility of the Scharrer letter (*id.* at 8a); that the court had consistently indicated that, if petitioner elected to move for a midtrial severance, the Double Jeopardy Clause would not bar a retrial (*id.* at 8a-9a); and that petitioner in fact requested that he " 'be severed out of this trial' " (*id.* at 10a (citation omitted)) and did not "voice[] *any* objection to a retrial" (*id.* at 11a (emphasis in original)). Based on this record, the court found that " 'the proceedings were terminated at the defendant's request and with his consent' " (*id.* at 11a, quoting *Lee* v. *United States*, 432 U.S. 23, 33 (1977)) and that "[t]he record belies" (Pet. App. 10a) petitioner's claim that he had not sought a termination of the trial before verdict. In addition, the court found that under *Oregon* v. *Kennedy*, *supra*, the government had not misled the court or intended to goad petitioner into seeking to discontinue the trial (Pet. App. 12a):

> [Although] this Court expected the government to put on testimony that would more fully support its theory that Scharrer's letter was written in furtherance of the conspiracy * * *, the Court has found no evidence that the government proceeded in bad faith in trying to get the letter admitted. Nor has it found evidence that the government intentionally misled the Court as to what it would be able to establish through its witnesses.
>
> Finally, the Court finds no intent on the part of the government to goad [petitioner] into moving for a mistrial.

Accordingly, the court held that the retrial of petitioner would not violate the Double Jeopardy Clause.

On petitioner's appeal, the court of appeals affirmed in a per curiam opinion (Pet. App. 1a-3a). The court of appeals ruled that the district court was not clearly erroneous in finding " 'no evidence that the government proceeded in bad faith in trying to get the letter admitted,' and no evidence 'that the government intentionally misled the court as to what it would be able to establish through its witnesses,' and 'no intent on the part of the government to goad [petitioner] into moving for a mistrial' " (*id.* at 2a (citation omitted)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the issues raised by petitioner are factbound and limited to the particular record in this case. Accordingly, further review is not warranted.

1. It is well established that where a mistrial has been declared at the defendant's request, the Double Jeopardy Clause does not bar a retrial unless the prosecutor intentionally provoked the mistrial request. See *Oregon* v. *Kennedy*, 456 U.S. 667 (1982); *United States* v. *Scott*, 437 U.S. 82 (1978); *Lee* v. *United States*, 432 U.S. 23 (1977); *United States* v. *Dinitz*, 424 U.S. 600 (1976). Thus, while the propriety of "a new trial after a mistrial has been declared without the defendant's request or consent depends on whether 'there is a manifest necessity for the [mistrial],' * * * [d]ifferent considerations obtain * * * when the mistrial has been declared at the defendant's request" (*Dinitz*, 424 U.S. at 606-607 (citation and footnote omitted)). See also *Kennedy*, 456 U.S. at 672. Under this standard, " 'a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution,

even if the defendant's motion is necessitated by prosecutorial or judicial error' " (*Dinitz*, 424 U.S. at 607 (citation omitted)). See also *Scott*, 437 U.S. at 93. This rule protects the defendant's " 'significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial' " (*Dinitz*, 424 U.S. at 607 (citation omitted)) and reflects that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error" (*id.* at 609 (footnote omitted)). A mistrial "motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact" (*Scott*, 437 U.S. at 93).

These settled principles control this case. As described above, it was petitioner's motion for severance, made before trial and renewed during trial, that led to the termination of the proceeding against him. Compare *Lee*, 432 U.S. at 33 ("[c]ounsel for petitioner made no effort to withdraw the motion, either after the initial denial or after the court's reminder that the motion was still under consideration"). Moreover, petitioner's motion and the district court's ruling plainly contemplated that a retrial would occur (compare *Scott*, 437 U.S. at 92; *Lee*, 432 U.S. at 30-31), and in fact the court made clear that petitioner would be subject to reprosecution. At no time during the district court proceedings did petitioner's counsel object to the proposed retrial or raise a double jeopardy claim. Compare *Lee*, 432 U.S. at 33. In these circumstances, the termination of the trial was "at [petitioner's] request and with his consent" (*Lee*, 432 U.S. at 33). Contrary to petitioner's contention, the Double Jeopardy Clause does not "relieve a defendant from the consequences of his voluntary choice" (*Scott*, 437 U.S. at 99).

Petitioner contends that a different standard should apply here because he had unsuccessfully sought a pretrial decision on the admissibility of the Scharrer letter and because the district court's midtrial ruling left him little choice but to request the severance. But nothing in the Double Jeopardy Clause requires that all pretrial motions be resolved before jeopardy attaches (cf. Fed. R. Crim. P. 12(e)), and the district court's procedure in this case was justified by the need to hear the testimony of the government's trial witnesses in order to rule on the issue of the admissibility of the Scharrer letter.[2] Furthermore, the court's ruling, even if it resulted in prejudice to petitioner at the joint trial, neither required that he seek to terminate the proceeding nor alters the legal consequences of his decision to do so.

> Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." * * * But it is [also] evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury * * *.
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> * * * In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial

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[2]Petitioner argues (Pet. 14) that "in retrospect" it was not necessary to defer ruling until trial. But that fact does not invalidate the approach followed by the district court in light of the circumstances as they existed at the time. Moreover, contrary to petitioner's suggestion, the district court specifically found that the government neither acted "in bad faith in trying to get the letter admitted" nor "intentionally misled the Court as to what it would be able to establish through its witnesses" (Pet. App. 12a).

> judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.

Dinitz, 424 U.S. at 608-609 (citation and footnote omitted); see also *id.* at 610; *Lee*, 432 U.S. at 32-33.[3]

Petitioner also contends that he only sought a severance instead of a mistrial and that it was the prosecution rather than the defense that "controlled the course of events" (Pet. 15). The district court correctly concluded that the record belies this claim (Pet. App. 10a). In particular, defense counsel specifically requested that petitioner " 'be severed out of this trial' " (*id.* at 10a (citation omitted)), and the district court ruled that " 'Mr. Posner, you are severed from trial. The Court will proceed to set your cause for trial' " (*ibid.* (citation omitted)). And at no point did petitioner raise the possibility, which he now urges (Pet. 15), that the trial could have continued against him rather than against Scharrer. See Pet. App. 11a. Petitioner's "request to be severed 'out' of the trial and his subsequent silence when the trial was terminated against him should be dispositive" (*ibid.*).

2. The Double Jeopardy Clause does preclude a retrial "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial [in the first proceeding]." *Oregon* v. *Kennedy*, 456 U.S. at 676. Under this standard, "the circumstances under which * * * a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a

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[3]In view of this principle, petitioner's assertion (which was never raised in the district court) that a failure to seek a midtrial severance might have been deemed a waiver of his claim of prejudice (Pet. 15 n.6) is especially unconvincing.

mistrial was intended to provoke the defendant into moving for a mistrial" (*id.* at 679). See also *Dinitz*, 424 U.S. at 611. The test is "one of *intent* to provoke a motion for a mistrial" (*Kennedy*, 456 U.S. at 674 (emphasis in original)), and it turns on "[i]nfer[ences] * * * from [the] objective facts and circumstances" of each case (*id.* at 675; see also *id.* at 679-680 (Powell, J., concurring)). A district court's determination of prosecutorial intent is "a finding of fact" (*id.* at 675) that is to be upheld unless it is clearly erroneous. See *United States* v. *Dante*, 739 F.2d 547, 548 (11th Cir.), cert. denied, 469 U.S. 1036 (1984); *United States* v. *Wodtke*, 711 F.2d 86, 88 (8th Cir. 1983); *Robinson* v. *Wade*, 686 F.2d 298, 309 (5th Cir. 1982); *United States* v. *Curtis*, 683 F.2d 769, 776 (3d Cir.), cert. denied, 459 U.S. 1018 (1982).

Applying this standard, the district court found "no intent on the part of the government to goad [petitioner] into moving for a mistrial" (Pet. App. 12a) and "no evidence" either that the government proceeded in bad faith or that it intentionally misled the Court (*ibid.*).[4] The court of appeals sustained these findings, noting that petitioner had presented nothing to indicate that the district court's findings were clearly erroneous (*id.* at 2a).

Petitioner contests the finding that the government did not intentionally act to goad him into seeking a mistrial. As his argument makes clear, this is a factbound challenge to the concurrent findings of both lower courts[5] and thus does

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[4]The district court so found even though it had originally "expected the government to put on testimony that would more fully support its theory that Scharrer's letter was written in furtherance of the conspiracy" (Pet. App. 12a).

[5]In his brief in the court of appeals, petitioner, acknowledging (at 31) that he had to show "that the prosecution acted with the intent to provoke the termination of his trial and for the purpose of subverting the protection afforded by the Double Jeopardy Clause," argued that the district court's ruling "rested on clearly erroneous findings with respect to the prosecution's intent" (*ibid.*) and that "the district court clearly erred in not finding [the requisite intent]" (*id.* at 33).

not warrant review by this Court. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984). In any event, for the reasons outlined in the opinions below, the district court and the court of appeals correctly found that there was no intent on the prosecutor's part to subvert the protections of the Double Jeopardy Clause by provoking petitioner into moving to terminate his trial.

Petitioner also argues (Pet. 19 (footnote omitted)) that the courts below erred in not considering "how the trial was going for the prosecution and the defense when the mistrial occurred." We do not doubt that the state of the case may be relevant in determining whether the prosecution had an incentive to provoke a mistrial. See *Oregon* v. *Kennedy*, 456 U.S. at 678-679 & n.8. Where the evidence shows an apparent design by the prosecutor to provoke a mistrial motion, the state of the case may suggest that the prosecutor was attempting to avoid an unfavorable verdict. Where there is no indication that the prosecutor has acted to provoke the mistrial motion, however, the state of the case is of little significance. As the courts below found, there was "*no* intent on the part of the government to goad [petitioner] into moving for a mistrial" and "*no* evidence that the government proceeded in bad faith" (Pet. App. 12a (emphasis added)). Furthermore, in response to petitioner's argument that the government was simply seeking to use the first trial as a "dry run" of the case, the court of appeals explained, as the district court had noted, that "the government pressed before trial for a ruling on the admissibility of the letter" (*id.* at 3a). Finally, if petitioner had felt that the trial was going very well for him, he was free to forgo his severance motion and continue to verdict with the first jury. His present contention that he was compelled to seek a severance is in effect a concession that the case against him was sufficiently strong that he feared an adverse verdict, even with a jury instruction limiting the admissions in the letter to co-defendant Scharrer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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